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In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL., and

JOHN MCCOMISH, ET AL., Petitioners

v.

KEN BENNETT ET AL., Respondents

On Writs of Certiorari To The United States Court of Appeals For the Ninth Circuit

Brief Amici Curiae of Four Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Petitioners

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Statement of Interest[1]

These Amici Curiae are five former commissioners of the Federal Election Commission ("FEC"), with FEC years and current affiliation indicated: **Lee Ann Elliott** (1982-2000, retired); **David Mason** (1998-2008, Visiting Senior Fellow, Heritage Foundation); **Bradley Smith** (2000-2005, Blackmore/Nault Designated Professor of Law, Capital University); **Hans von Spakovsky** (2006-2007, Visiting Legal Scholar, Heritage Foundation); **Darryl Wold** (1998-2002, private law practice emphasizing election and political law). All chaired the FEC during their tenure except for Commissioner von Spakovsky.

As former FEC commissioners with many years of experience in interpreting the Federal Election Campaign Act ("FECA"), implementing regulations, devising enforcement policy, and investigating violations, Amici have an interest in advising the Court of the complexities and difficulties of the practical application of federal campaign finance laws and the First Amendment to political speech and activity.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

Summary of Argument

Government funding of elections can serve two purposes: preventing corruption, and limiting political discourse. This Court has only recognized the first purpose as a constitutional justification for such funding. However, data surrounding the use of government funding suggest it is the second purpose–speech suppression–that motivates government funding.

The most telling evidence of speech suppression is underfunding a candidate's campaign. If corruption were the concern, government funding would broadly match that raised through traditional, private funding. But as presidential government funding demonstrates, this is not the case. Such funding has not kept up with private funding, resulting in presidential candidates declining government funding–first in the primaries in 2000, and in 2008, in general elections. With presidential candidates able to raise hundreds of millions of dollars, government funding that does not even break $100 million is woefully inadequate.

Triggered matching fund schemes likewise suppress speech by imposing inadequate spending ceilings on their participants. But to prevent declining interest, matching funds are provided to participating candidates based on their privately-funded opponent's and third party spending. This introduces a new level of speech suppression, restricting not only participating candidates' speech but also chilling the speech of non-participating candidates and third parties. It also interjects substantial government discretion and oversight into all campaign spending. This burdensome effect, serving a speech-suppression interest, is unconstitutional.

Argument

I. Public Funding of Elections Is Unconstitutional If It Serves A Speech-Suppression Function.

A. Public Funding of Elections Can Serve Legitimate or Illegitimate Purposes.

All systems of public funding[1] for elections involve a transfer of taxpayer dollars from the government to a candidate for public office. In exchange for this funding, candidates typically must agree to limit their campaign expenditures either to the amount they receive in government funds, or to some other set amount. This arrangement could serve one of two different purposes. First, government funding might be seen as a method of paying candidates not to take private money for their campaigns. Since large private contributions are often seen as having a corrupting effect on candidates, paying candidates to take less private money could be seen as serving a legitimate anti-corruption interest. This type of government funding of candidates would function as a replacement for private funding, and the key effect of the system

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[1] Throughout this brief, "government funding" and "taxpayer funding" of elections will be used interchangeably with "public funding" in order to more accurately indicate the type of funding involved. All election campaigns are publicly funded in the sense that the money used to pay for them comes from the public at large. The question is whether the funds flow directly from the public to the candidate through traditional funding such as individual contributions or indirectly via taxation and government contributions.

would be to change the source of a candidate's spending, rather than its amount.

Another possibility, however, is that government funding might be used as a method by which the government pays candidates not to engage in political speech (or, to be more precise, which pays candidates to engage in less political speech than they would without the payment). Since candidates must agree to limit their spending as a condition of receiving taxpayer funds, the amount of speech that candidates are free to engage in may be substantially and illegitimately lessened by the system. This type of government funding of candidates would be directed not only towards the source of a candidate's funding, but also the amount.

For many supporters of government funding, limiting speech is not merely a potential by-product of funding, but one of its main purposes. As Common Cause argued in 1995, "[t]he public financing system has worked. Spending has been limited." Common Cause, *Presidential Public Funding FAQ*, *at* http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1389223 (last visited Jan. 19, 2011). Likewise, in advocating for the challenged government funding scheme, Arizonans for Clean Elections repeatedly cited "limit[ing] campaign spending" as the first justification for the law, JA-93, 95, and argued that enacting taxpayer election funding "would **lower the cost and length of campaign** [sic]" JA-91 (emphasis in original); see also JA-104 ("To get big money out of state elections and reduce campaign spending, Clean Elections will cost less than 2 percent of the current budget surplus."); JA-110 ("**Matching funds limit spending.** A traditional candidate may think twice about raising

additional funds against a Clean Elections candidate.") (emphasis in original); JA-228-29 ("By limiting campaign spending and increasing disclosure requirements, [Proposition 200] will level the playing field").

B. *Buckley v. Valeo* Does Not Foreclose All Challenges to Government Funding of Candidates.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court viewed the system of government funding for presidential elections set up by the Federal Election Campaign Act of 1971[7] as serving an anti-corruption function, rather than a speech suppression one. In enacting taxpayer funding for presidential elections, the *Buckley* Court reasoned, "Congress was legislating for the 'general welfare' to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." The scheme was an "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. According to the Court, because the taxpayer funds in question were being used for the anti-corruption purpose of replacing

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[7] While Congress had previously provided for taxpayer funding for presidential candidates in the Presidential Election Campaign Fund Act of 1966, this legislation was suspended in 1967 by a provision barring any appropriations until Congress adopted guidelines for the distribution of money from the Fund. In 1974, FECA was amended to add taxpayer funding for nominating conventions and primary campaigns. *Buckley*, at 85 n.114.

private contributions, the scheme was a valid exercise of Congress' authority under Art. I, s 8.[3]

However, while the Court concluded that government funding for election campaigns was not per se unconstitutional, nothing in *Buckley* suggests that such schemes are exempt from all constitutional scrutiny. If a system of government funding for elections were designed not "to facilitate and enlarge public discussion and participation in the electoral process," *Id.* at 92-93, but to reduce the amount of campaign speech, this would raise serious constitutional concerns. The Court also made a point of noting that "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." *Id.* at 91 n 124.[4] The same cannot be said for government

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[3] The Court does not appear to have considered the possibility that contributions might continue to have a corrupting influence on candidates even where the contributions are made by the government, rather than by a private individual or group. If contributions to a candidate from a political advocacy group (for example, a group opposed to public funding for elections) are problematic because this might improperly influence the candidate's position on public funding, the fact that a candidate is being funded by a government funded election system, and thus may be influenced by this fact to support continued taxpayer funding for elections, would seem equally problematic.

[4] Unlike the Arizona scheme at issue here, the system in *Buckley* did not involve triggered matching funds based on spending by opposing candidates, individuals, or groups. While FECA did contain what it called "matching funds" for presidential primaries, the government funds in question matched funds raised by the candidates from non-govern-

funding systems that contain triggered matching funds.

C. Underfunding of A Government Funding Scheme Indicates It Serves A Speech-Suppression Function.

One way to determine whether a system of taxpayer funding for elections serves an anti-corruption or a speech-suppression function is to compare funding levels under the scheme with the levels of spending by traditionally funded candidates. If the purpose of government funding is simply to replace private contributions with government contributions, then the amount of funding granted to a candidate under the scheme ought to broadly match the amount of funding a candidate is likely to receive if his private contributions weren't being replaced with taxpayer funded ones. On the other hand, if reducing the level of spending is the goal, one would expect the level of government funding to be substantially and consistently less than what is typically spent by traditionally funded candidates. Taxpayer funding of presidential elections is illustrative of this distinction.

1. The Demise Of Government Funding of Presidential Campaigns.

In 1971, Congress adopted as part of FECA the Presidential Election Campaign Fund Act, which establishes government funding of major party presidential candidates, both during primary and general election campaigns. *See* 26 U.S.C. §§ 6096, 9001-9013, 9031-9042. The Act allows presidential candidates of

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mental sources, rather than matching them based on opposition speech.

major parties to receive government funding for their campaigns in exchange for limiting their campaign spending. To qualify for funding during their primary campaigns, candidates must raise over $5,000 in $250 increments in 20 states ($100,000 total). 26 U.S.C. § 9033(b)(3) and (4). If they qualify, they receive a dollar-for-dollar match on the first $250 of each contribution they receive. *Id.* § 9034(a). In exchange, they agree to limit their total spending to $10 million plus a cost-of-living adjustment, with a maximum of either $200,000 per state (also adjusted based on cost of living) or $0.16 per eligible voter in that state (adjusted for cost of living)–whichever is greater. *Id.* § 9035(a). To be eligible for government funding as a general election candidate, the major party presidential nominee must agree to limit her total expenditures to the amount given through government funding–$20 million plus the cost of living adjustment–and agree not to receive any contributions. *Id.* § 9003(b).[5]

From 1976-1996, each winning presidential candidate participated in both primary and general election government funding. WhiteHouseForSale.Org, *Facts About the Presidential Public Funding System*, *available at* http://www.whitehouseforsale.org/facts.cfm (last visited Jan. 19, 2011).

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[5] Minor party and new non-major party candidates are eligible for partial government funding based on the percentage of voter supporter in the prior election (for minor party candidates) or based on voter support during the current election, paid after the election is conducted (for new non-major party candidates). 26 U.S.C. § 9004(a)(3).

In 1996, Steve Forbes chose not to use government funding, running his primary campaign with $41 million. FEC Report, *Presidential Candidate Summary Report, at* http://www.fec.gov/pres96/presmstr.htm (last visited Jan. 19, 2011). This amount was on par with his Republican primary opponent Bob Dole, who financially led those accepting government funding, and spent $44 million in his primary. *Id.* Bill Clinton also participated in his primary race with $42 million available to him. *Id.* The respective winners of the 1996 primaries both participated in general election government financing, receiving $61 million each in funding, with third party candidate Ross Perot receiving $29 million. FEC Report, *Financing the 1996 Presidential Campaign, available at* http://www.fec.gov/pres96/presgen1.htm (last visited Jan. 19, 2011). Thus far, the amount of government funding appeared to be adequate.

This changed in 2000. In the 2000 primaries, numerous candidates declined government funding, most notably Republican George W. Bush, who raised just over $94 million, and Republican Steve Forbes, who raised just over $48 million. FEC Report, *Presidential Primary Campaign Receipts Through July 31, 2000*, at http://www.fec.gov/press/bkgnd/pres_cf/documents/presm82000rec.pdf (last visited Jan. 19, 2011). Those who did participate raised between $40 and $50 million: Republican John McCain, $48 million; Democrat Al Gore, $49 million; and Democrat Bill Bradley, $42 million. *Id.* And while the 2000 major party nominees Bush and Gore took general election government funding of $67.5 million each, Federal Election Commission, *Annual Report 2000*, at 17 (June 2001),

http://www.fec.gov/pdf/ar00.pdf, the insufficiency of government funding emerged. And the 2000 primary was only the beginning.

In 2004, now incumbent George W. Bush again declined government funding, this time raising $240 million in private funds. Federal Election Commission, *Presidential Pre-Nomination Campaign Receipts Through July 31, 2004, available at* http://www.fec.gov/press/bkgnd/pres_cf/documents/presreceiptsm82004.pdf (last visited Jan. 19, 2011). Democrats Howard Dean and John Kerry likewise declined government funding, raising $50 million and $221 million, respectively. *Id.* The leading participating candidates raised a comparatively paltry $29 million (John Edwards), $21 million (Dick Gephardt), and $18 million (Joe Lieberman)–out-raised $10 to $1 by their privately-funded counterparts. *Id.*

Yet government funding for the general election remained intact. In the 2004 general election, both major party candidates took government funding of $74.6 million. Federal Election Commission, *Press Release* (Feb. 3, 2005), http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html.

Unsurprisingly, for the 2008 primary, none of the front-running presidential candidates including Hillary Clinton, Barack Obama, John McCain, Mitt Romney, Rudy Guiliani, and Ron Paul–took government funding in their respective primaries. Clinton raised $207 million, Obama raised $336 million, McCain raised $120 million, Romney $50 million, Guiliani $55 million, and Paul $34 million. Federal Election Commission, *Presidential Pre-Nomination Campaign Receipts Through June 30, 2008,*

http://www.fec.gov/press/presssummary.pdf (last visited Jan. 19, 2011). And for the 2008 general election, for the first time, a presidential candidate declined government funding: Barack Obama, the Democratic presidential nominee, reported private contributions of over $748 million, well beyond any government funding he would have received. Federal Election Commission, *Presidential Campaign Finance*, *at* http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P00000001&searchType=&searchSQLType=&searchKeyword= (last visited Jan. 19, 2011). Given these vast private resources raised, the demise of government funding for presidential campaigns is all but assured.[6] At least assuming no Congressional act to rectify the woefully inadequate amount afforded for such campaigns.

And there is no reason to think Congress will do so. To date, the only Congressional change to the Presidential Election Campaign Fund Act was in 1993, when it raised the $1 check-off on individual federal tax returns to $3 because public support through the check off was declining. *See* Scott E. Thomas, *The Presidential Election Public Funding Program–A*

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[6] The increasingly later dates for major party conventions, which also receive government funding, underscores this demise. While historically, each party's conventions have been, at the latest, in mid-August, with the possibility of more funding due to lack of participation of presidential candidates, these conventions have been as late as early September. In 2004, the Republican National Convention was August 30-September 4. In 2008, it was September 1-September 4. The 2008 Democratic National Convention was August 25-August 28.

Commissioner's Perspective, at 4 (Jan. 31, 2003), http://www.cfinst.org/events/pdf/scott_thomas.pdf ("the number of taxpayers checking 'YES' on their tax return has declined slowly over the years from about 40 million for 1980 returns to about 20 million for 2000 returns."). That Congress did not raise the amount given to candidates suggests that speech-suppression rather than anti-corruption is the real purpose of the fund. While nothing precludes numerous candidates from seeking government funding, such funding cannot credibly fund those candidates adequately.[7]

2. The Rise of Triggered Matching Funds.

Mirroring their presidential counterpart, various states have adopted government funding schemes for state level elections that likewise seek to suppress speech. In order to entice participation, these state government funding schemes mitigate their low spending limit by controlling additional spending through matching funds, triggered at the expense of a privately-funded opponent. For example, the triggered matching funds scheme at issue in this case provide qualifying general election candidates in contested races with $638,222.50, subject to increase up to three times that amount based upon the spending of their

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[7] *See* David Wold, *The Federal Experience: Paradigm Or Paradox*, 34 Ariz. State L. J. 1161, 1173-1175 (2002) (comparing presidential campaign funding with advertising funds spent, and arguing that government funding's indexing for inflation is insufficient to keep up with media costs). The inadequacy of government funding advantages incumbents because they have already established name recognition and need less funding to campaign for their reelection.

nonparticipating opponent or third party expenditures.[8] Ariz. Rev. Stat. Ann. §§ 16-951(C), 16-952(C), 16-961(H). In Maine, a gubernatorial general election candidate is given $600,000 in the general election, with an additional $600,000 provided to them based upon their privately-funded opponent's spending.[9] Me. Rev. Stat. Ann. tit. 21-A, § 1125(8), (9). And in North Carolina, triggered matching funds allow for two times the initial outlay, which in 2008, was $233,625.[10, 11] N.C. Gen. Stat. § 163C278.67(b), (c). Such triggered

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[8] In comparison, McCain raised $21.6 million, his opponent Glassman $1.3 million, in Arizona's 2010 statewide race for U.S. Senate. OpenSecrets.Org, *Arizona Congressional Races In 2010*, at http://www.opensecrets.org/races/election.php?state=AZ (last visited Jan. 19, 2011).

[9] Candidates Collins and Allen spent $8 million and $5.9 million, respectively, for in their statewide campaigns for U.S. Senator. OpenSecrets.Org, *Maine Congressional Races In 2008, at* http://www.opensecrets.org/races/election.php?state=ME&cycle=2008 (last visited Jan. 19, 2011).

[10] Comparable statewide U.S. Senate races in 2008 show Dole raised and spent $19.5 million on her North Carolina race, and her Democratic opponent Hagan raised and spent $8.5 million. OpenSecrets.Org, *North Carolina Congressional Races In 2008, at* http://www.opensecrets.org/races/summary.php?cycle=2008&id=NCS1 (last visited Jan. 19, 2011).

[11] Minnesota, Connecticut, and Florida also adopted triggered matching fund schemes, but these schemes were enjoined as unconstitutional. *See Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994); *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010).

matching funds tacitly acknowledge the inadequacy of the initial funding offered. And their justification– limiting speech–is unconstitutional.

III. Triggered Matching Funds Unconstitutionally Suppress Speech.

As noted above, *Buckley* upheld FECA's government funding system for presidential elections on the grounds that it served "not to abridge, restrict, or censor speech, but rather [ ] use[d] public money to facilitate and enlarge public discussion and participation in the electoral process." *Id.* at 92-93. Depending on how a system is designed, however, government funding for elections may serve to reduce public discussion and participation, rather than enlarge it.

A candidate must decide at the outset of the campaign if he or she can raise more money than the size of the grant, and if doing so is beneficial to the campaign. If not, the decision is easy–the candidate will take the grant. A simple grant of the type approved in *Buckley* can therefore potentially increase speech by providing candidates with more funds than they could raise on their own. Candidates who think that outspending the grant will increase their chances of election may do so.

Triggered matching funds support participation in the system, however, not by helping candidates speak more than they otherwise might, but by discouraging non-participating candidates from speaking more than the grant level. Their purpose is to make the non-participating candidate's added speech ineffective in achieving its purpose–election to office. Because triggered matching funds require no time or fundraising

costs, the actual effect is not even to make spending equal, but to give participating candidates more financial resources for speech than non-participating candidates. In effect, the state says, "Spend more than the limit and we will contribute to your opponent to try to defeat you in the election." The state's goal is to convince candidates that speech above the "voluntary" limit will serve no purpose. Faced with this, future candidates will opt out of traditional private funding. When they do, the level of the grant will not settle at the higher level of the base grant plus matching grants, but at the lower level of the base grant. By making speech above the base grant relatively useless for candidates, the state seeks to limit the amount of political discourse.

Triggered matching funds limit not only the political discourse of the candidates, but total political discourse. They also chill the speech of individuals and groups who do not wish to indirectly fund the campaigns of candidates they oppose by supporting a privately funded candidate or opposing a government-funded one. *Buckley*, 424 U.S. at 91 n.124 (holding that FECA's funding scheme was constitutional because "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree."); *see* David M. Primo, *What Does Research Say About Public Funding for Political Campaigns* (August 2010), *at* http://www.ij.org/about/3466 (discussing how triggered matching funds chill speech). Privately funded candidates and third party entities are more likely to reign in their own spending, rather than spend and trigger matching funding to an opponent.

Triggered matching funds also aid in limiting the

speech of candidates who accept government funding. Because government funding is conditioned on a candidate's accepting limits on other sources of funding, the government can reduce the amount of speech a taxpayer funded candidate can engage in by setting a low funding level. However, since participation in government funding schemes must be "voluntary" setting the spending level too low will just result in candidates not participating in the scheme. Triggered matching funds allow states to set base funding at very low levels, and to increase funding below the minimal amount necessary to keep candidates participating in the scheme.

Further, the use of triggered matching funds inevitably requires government actors to micromanage spending decisions of candidates and other parties, which can also have a chilling effect on speech. In *Buckley*, the Court addressed the parties concern "that public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom" by stating that "[t]he concern is necessarily wholly speculative and hardly a basis for invalidation of the public financing scheme on its face." *Id.* at 93 n.126. Based on our experience as Commissioners with the Federal Election Commission, however, we can state that such concerns are not mere speculation. Government funding of campaigns requires the use of campaign funds to be constantly investigated–and therefore second guessed–by the administering agency to ensure that funds are being spent for "legitimate" campaign purposes. That is "legitimate" in the opinion of government bureaucrats.

And where triggered matching funds are involved,

this second-guessing must extend not only to candidates who participate in the scheme, but to all candidates, individuals, or groups who choose to participate in an election. Because campaign speech may result in taxpayer funding to candidates it is directed against, government funding systems require some mechanism to determine 1) whether a given statement is or is not campaign speech, and 2) whether it is or is not directed against a particular candidate. Such an intrusive system is itself a burden on political speech, making individuals and groups less likely to get involved in the political process and more likely to face sanctions if and when their view of what constitutes opposing campaign speech differs from that of the administrating agency.

Speech can be discouraged and chilled not only by directly penalizing or banning it, but by regulations and programs intended to make certain that it serves no useful purpose. That states like Arizona have chosen this latter course rather than direct prohibitions does not mask the unconstitutional purpose at the heart of the program.

Conclusion

Because Arizona's triggered matching funds serve a speech suppression interest, they are unconstitutional. The Ninth Circuit decision to the contrary is erroneous and should be reversed.

Respectfully submitted,

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